the company on the balance of its current account with the bank or otherwise etc."; and also as in the second clause of the debenture the company charged its undertaking and all its property with the payments referred to in the first clause by way of floating charge. Another point was raised in connection with the signing of the debenture, but was answered to my satisfaction by counsel for the debtor company. I came to the conclusion that a winding-up order would not be useful in any way and that no benefit would result from it, and that therefore no winding-up order should be made. Furthermore, it seemed to me that if an option to purchase the company's assets was given to the mining syndicate and the mining syndicate eventually bought the assets for the agreed price of $600,000, the unsecured creditors would benefit from the surplus left after payment of the amount due to the debenture-holder.

Counsel for the petitioning creditor suggested that the wishes of the other unsecured creditors should be ascertained. But I thought that this was unnecessary as it was clear to me that no benefit would result to them from the making of a winding-up order.

Although the ground on which I dismissed the petition was that it did not allege a case for winding up within section 295(1)(b) of the Companies Ordinance, I took the view that it would be unfair to order the petitioning creditor to pay the costs of the debtor company, the debenture-holder and three other creditors, and I therefore made no order as to costs.

Petition dismissed.

Solicitors: *Hilborne, Chung & Co.*; *Braddell Bros.; Allen & Gledhill; Wee Swee Teow & Co.*

UNITED MALAYAN INSURANCE CO. LTD. v. LEE YOON HENG

[O.C.J. (Gill J.) September 11, 1964]

[K.L. — Civil Suit No. 53 of 1963]

Insurance — Policy of Insurance — Non-disclosure of material facts — Road Traffic Ordinance, 1958 s. 80(3).

This was a suit for a declaration under section 80(3) of the Road Traffic Ordinance, 1958, that the policy of insurance issued by the plaintiff company to the defendant in respect of a motor vehicle was void for non-disclosure of material facts. In the insurance proposal form the purpose for which the vehicle was to be used was stated as "Private". It appeared however that the motor vehicle was used for the purpose of the defendant's business and not as a private passenger vehicle.

Held: the plaintiffs were entitled to avoid the policy on the ground that it was obtained by non-disclosure of material fact or by a representation of fact which was false in some material particular.

CIVIL SUIT.

Henry B. H. Cheah for the plaintiffs.

V. K. Palasuntharam for the defendent.

Cur. Adv. Vult.

Gill J.: This is a suit for a declaration under section 80(3) of the Road Traffic Ordinance, 1958 that the policy of insurance issued by the plaintiff company to defendant in respect of motor vehicle BD 862 is void for non-disclosure of material facts.

The defendant bought the motor vehicle from Eu Tong Sen Finance (M.) Ltd. of Kuala Lumpur on hire-purchase. He signed the hire-purchase proposal form, and the acceptance of the proposal was signed by one Wong Peng Wah on behalf of the finance company, on 8th December, 1960. The motor vehicle was then lying in front of the office of the finance company and it was described in the hire-purchase proposal form as a Volkswagen "Station Wagon". This proposal form was filled in by Wong Peng Wah who apparently entered the description of the motor vehicle in the form on his own initiative, but the defendant furnished the particulars about his identity card, his driving licence, his address and his business or occupation. His occupation was entered as that of an advertiser.

After the hire-purchase proposal form had been signed, Wong Peng Wah suggested to the defendant to take out an insurance policy in respect of the motor vehicle from a company of which Eu Tong Sen Finance (M.) Ltd. were the agents. The defendant agreed and asked Wong Peng Wah to fill in the proposal form for insurance, which he subsequently signed. He now says that he does not know English and that Wong Peng Wah, before filling in the form, did not ask him what type of body the vehicle had but saw the vehicle himself. He further says that, apart from the driver's seat, there were two rows of seats inside the vehicle for persons to sit on. Those two rows of seats were there when the insurance proposal form (P.2) was signed. The seats could be taken out.

Under the column headed "make of vehicle and type of body" in the insurance proposal form the words filled in were "Volkswagen Station Wagon", and in answer to the question, "State clearly for what purpose the above vehicle is to be used", was the word "Private". As I have stated above, this insurance form was filled in by Wong Peng Wah who represented the Finance Company from whom the vehicle was obtained on hire-purchase and who were also the insurance agents for the plaintiff company. On 10th December, 1960 the plaintiffs issued a policy of insurance numbered as MC/02018, whereby they agreed, *inter alia*, and subject to the conditions and exceptions therein set out, to indemnify the

defendant against all sums which the defendant should become legally liable to pay in respect of accidental bodily injury or damage to property caused by the vehicle of which a description was set out in the schedule to the policy of insurance. This policy was headed as "Private Car Policy".

An accident occurred on 7th May, 1961, when the defendant was driving the said vehicle, in consequence of which injury and loss were caused to certain passengers in the vehicle including one Chang Chow Tai (spinster) who on or about 7th November, 1962 commenced in the High Court at Kuala Lumpur in Civil Suit No. 871 of 1962 an action against the defendant for damages in respect of the injury and loss sustained by her. The defendant claimed to be entitled to indemnity against the plaintiffs under the provisions of the said policy of insurance in respect of the claim made by Chang Chow Tai and any other liability arising out of the said accident, whereupon the plaintiffs commenced this suit on 22nd January, 1963. Thus the suit has been brought within the period stipulated in the Ordinance.

The issues in this action are:—

(1) Whether the defendant applied for insurance from the plaintiffs;

(2) Whether he completed the proposal form for such insurance; and

(3) Whether there was any misrepresentation or non-disclosure in the proposal for insurance.

On the evidence before me it is quite clear, and this is not denied by the defendant, that the proposal form for the insurance was completed by Wong Peng Wah at the defendant's request and that the defendant signed a declaration at the foot of the proposal form to the effect that the particulars of the proposal were true and that the proposal shall be the basis of the contract between himself and the plaintiff company. I therefore find as a fact that the defendant made an application for insurance and that he completed the form.

The legal effect of the completion by the proposer of a proposal form and of his signing the declaration at the foot of such form is stated at page 201 of *Halsbury's* Laws of England, 3rd Edition, Vol. 22, as follows:—

"The proposal form usually concludes with a declaration, which is often required to be separately signed by the proposer so as to draw his particular attention to the importance of what he is doing, by which the proposer either warrants that the statements contained in the proposal are true, or agrees that they are to be the basis of the contract between the parties, or accepts that their truth is to be a condition precedent to the validity of the contract. Sometimes all three variations of the same terms are included, and sometimes an additional clause is inserted to the effect that no material information has been withheld. These various formulae are usually designed to lead up to a form of policy by which the proposal is incorporated. If it is, the proposal becomes a contractual document by reference to which the insurers' rights to repudiate are governed. If it is not, there is on record, for the purpose of applying the common law rules, what has in fact been expressly stated to, and inferentially withheld from, the insurers."

Coming now to the question whether there was any misrepresentation or non-disclosure, it will be observed that this question turns on the description of the motor vehicle and the purpose for which it was to be used, as stated in the insurance proposal form and embodied in the policy of insurance. The vehicle was described in the hire-purchase proposal and the proposal for insurance as a "Volkswagen Station Wagon". I do not propose to formulate a definition of the words "Station Wagon" except to say that, as far as my knowledge of motor vehicles goes, a station wagon is essentially a private passenger car with luggage space in the main body itself behind the rear passenger seat with access from the outside at the back, as opposed to an ordinary private car which normally has a luggage boot outside the main body. No haulage permit is necessary for a station wagon, except when it is to be used for carrying goods other than the owners personal luggage which is often done by businessmen. A station wagon is a useful private car for touring purposes in that there is easy access to one's personal luggage from inside the vehicle itself. I believe the words "estate car" and "countryman" are synonymous with "station wagon".

A photograph of the vehicle which is the subject matter of this suit has been produced in evidence (Exhibit P.1). Looking at this vehicle in the photograph I would say that it is a different breed altogether from a station wagon. To my mind, the motor vehicle in question looks more like a van which is defined in *Oxford Dictionary* as "a large, usually covered vehicle for conveying furniture or other goods". However, nothing very much turns on the description of the vehicle because the operative words are those in relation to its user. Indeed if that were the only misrepresentation in the proposal form, perhaps it could be argued successfully by the defendant that it was merely a wrong description of the vehicle.

The material misrepresentation or non-disclosure was with regard to the purpose for which the vehicle was to be used. The defendant has stated in evidence that the vehicle was used for carrying his equipment such as a projector, slides and a tape recorder for advertisement purposes in villages and kampongs in connection with his business as an advertiser. For this purpose he applied for the haulage permit issued to his elder brother to be transferred to his own name, and a haulage permit was in fact issued

on 31st January, 1961 by the chairman of the Central Licensing Board of the Road Transport Department in the name of the defendant as well as the names of his father and elder brother. This licence (P.4) was granted in the following terms:—

"The authorised vehicle shall be used for the carriage of Licensees' own goods being cinematographic equipment, including films and a generator within the States of Perak, Malacca, Johore, Selangor and Negri Sembilan."

The number of the vehicle in question was not given in the haulage permit, but it was stated in the inspection report of the Senior Registrar and Inspector of Motor Vehicles, Selangor dated 21st February, 1961 (Exhibit D.5). Against the column "Remarks" in D.5 were the words "One bench seat 60 inches wide fitted at rear". A clerk named Kumaraya Kumaraja from the office of the Senior Registrar and Inspector of Motor Vehicles, Selangor (P.W.2) gave evidence to say that according to the records of the Registrar a haulage permit was issued to motor vehicle BD 862 on 31st January, 1961. According to him the bench seat fitted at the rear of the vehicle would be behind the driver's seat.

It is quite clear from the evidence that the defendant bought the motor vehicle in question to use it for the purpose of his business and not as a private passenger car. The essential purpose for which it was used was the carriage of goods and equipment in connection with the defendant's business. Clearly therefore there was a misrepresentation or non-disclosure as to the purpose for which the vehicle was to be used. Sun Chung Ta (P.W.1), the manager of the plaintiff company, has stated that if the vehicle was to be used for commercial purposes his company would have issued not a private car policy but a commercial vehicle policy, in which event the premium charged, the other conditions and limitations as to use would be different. Moreover, the premium charged would be higher.

Mr. Palasuntharam on behalf of the defendant says that as the defendant cannot read and write English and as he was not asked any questions as to the type of the vehicle, Wong Peng Wah in looking at the vehicle and entering its description in the insurance proposal form was acting as the plaintiff's own agent, so that his knowledge must be imputed to the plaintiffs. He has thus argued that there was no misrepresentation on the part of the defendant. I find very little substance in that argument because the law in such cases is quite clear, as set out in the following paragraph at page 204 of *Halsbury's* Laws of England, 3rd Edition, Vol. 22:—

"In filling in the answers in a proposal form an insurance agent, except in the case of industrial assurance, is normally regarded as the agent for the proposer, at the request, express or implied, of the latter. Even if the agent knows the truth, his knowledge is not in that case imputed to the insurers. If he is careless in filling up the form, it is the proposer, not the insurers, who may maintain an action in negligence against him. Furthermore, where the proposer himself signs the proposal form, as is usually insisted upon by insurers, by signing he adopts whatever answers the agent has inserted and makes them his own. This is clearly the case where he reads and approves the answers before signing; but the position is the same if he chooses to sign the proposal without reading them, or if he signs the form when it is blank, leaving it to the agent to insert the answers later. It is irrelevant to inquire how the inaccuracy arose; or whether the agent acted honestly or dishonestly; or whether the agent had forgotten or misunderstood the correct information he had been given; or whether the answers were a mere invention on the part of the agent; if the result is that inaccurate or inadequate information is given on material matters, or that a contractual stipulation as to accuracy or adequacy of any information given is broken, it is the proposer who has to suffer."

On the authority of the above statement of the law the plaintiffs are entitled to avoid the policy of insurance dated the 10th December, 1960 bearing No. MC/02018 on the ground that it was obtained by the non-disclosure of material fact or by a representation of fact which was false in some material particular, and I make a declaration accordingly with costs against the defendant.

Declaration accordingly.

Solicitors: *Allen & Gledhill; V. K. Palasuntharam.*

PUBLIC PROSECUTOR v. NG NAM ONN

[R.Cr.J. (Ong J.) September 12, 1964]

[K.L. — Criminal Revision No. 19 of 1964]

Criminal Procedure — Withdrawal of charge by prosecution — Order of discharge should amount to acquittal.

On the withdrawal of a charge by the Deputy Public Prosecutor against the accused on a charge under the Betting Ordinance the magistrate made an order of discharge *simpliciter* and not an acquittal.

Held: where the prosecution withdraws a charge it has been the established practice to acquit the accused.

[**Editorial Note:** The attention of magistrates is also drawn to the Editorial Note in *Ariffin* v. *Public Prosecutor* [1953] M.L.J. 126.]

CRIMINAL REVISION.

Ong J.: The accused Ng Nam Onn was arrested in the premises of the Selangor Turf Club on April 19, 1964 and charged in the Magistrate's Court, under section 6(3)(a) of the Betting Ordinance, 1953, for having acted as a bookmaker. He was granted bail. The trial was twice adjourned, and on August 27, after the prosecuting officer was granted a brief adjournment to obtain instructions from the Deputy Public Prosecutor, the charge was withdrawn.